BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Application of Pacific Gas and Electric Company for Authority, Among Other Things, to Increase Revenue Requirements for Electric and Gas Service and to Increase Rates and Charges for Gas Service Effective on January 1, 2003.	Application 02-11-017 (Filed November 8, 2002)
Investigation on the Commission's own Motion into the Rates, Operations, Practices, Service and Facilities of Pacific Gas and Electric Company.	Investigation 03-01-012 (Filed January 16, 2003)
Application of Pacific Gas and Electric Company Pursuant to Resolution E-3770 for Reimbursement of Costs Associated with Delay in Implementation of PG&E's New Customer Information System Caused by the 2002 20/20 Customer Rebate System.	Application 02-09-005 (Filed September 6, 2002)

REPLY BRIEF OF THE CONSUMER PROTECTION AND SAFETY DIVISION TO PG&E'S OPENING BRIEF IN THE BILLING AND COLLECTION INVESTIGATION

I. INTRODUCTION

Pursuant to the Administrative Law Judge's Second Ruling Revising the Schedule, the Consumer Protection and Safety Division (CPSD) submits this Reply to the Opening Brief of Pacific Gas and Electric Company (PG&E) in the PG&E Billing and Collection Investigation, I.03-01-012.

Although PG&E asserts that it acted reasonably and in good faith, PG&E's Opening Brief offers no persuasive arguments that it should not return money to its customers that was overcollected in violation of PG&E's tariffs. PG&E's argument that no fine is warranted is also without merit. At the heart of its arguments is the basic mistake that "no harm was done". In fact, PG&E caused tremendous hardship and financial stress on its customers, who were presented with huge backbills that they did not owe, faced with disconnection notices, and sent to collections. Many customers were shut-off for non-payment and many entered into harsh payment arrangements. As described in letters from customers (Ex.5), they suffered stress, frustration, and financial hardship. PG&E grudgingly admits a few customers may have been harmed, but not the majority, which is not supported by the facts. In any event, the long-standing Commission policy is that unlawfully collected charges should be refunded, and no showing of additional financial harm (other than the illegal overcharges) such as inability to pay for food or rent, for example, is required.

Moreover, despite PG&E's repeated (and empty) assertions that its interpretation of its tariff was reasonable, it was clearly not[1]. The Commission has already found that, in response to PG&E's application for rehearing of Resolution G-3372, "PG&E's argument that "billing error" only occurs when a bill has been sent and is later found to be incorrect is not reasonable." (D.05-09-046, p.9.) PG&E's interpretation that the definition of "billing error" was only limited to an "incorrect bill" is unreasonably narrow – the Commission stated: "This extremely narrow definition of billing error is neither a reasonable nor a common-sense regulatory interpretation." (D.05-09-046, p.7.) Also, the evidence demonstrated that PG&E repeatedly relied on Tariff Rule 9, and unreasonably (and without much analysis) ignored the time limits in Tariff Rule 17.1(B)(2)(a).

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[1] Even if the tariff language was considered "vague", the Commission's long-standing policy is for tariff ambiguities to be resolved in favor of the customer. (See, e.g., *Application of Pacific Gas and Electric Company To Revise Its Electric Marginal Costs, Revenue Allocation, and Rate Design*, D.05-12-025, p.11; 2005 Cal. PUC LEXIS 532.)

PG&E's suggestion that *only* low-income customers receive a mere 25% of the amount they were illegally backbilled is unfair and discriminatory. PG&E does not take its responsibility to comply with its tariffs seriously, dismissing the tariff violations as a result of "unavoidable increases in delayed and estimated bills".[2] CPSD's Reply takes up PG&E's arguments in turn.

II. CPSD's REPLY

A. PG&E's Mistaken Interpretation was Not Reasonable And Caused Serious Harm to Customers

PG&E's introduction makes several points which are both irrelevant and wrong, which it elaborates on in the discussion of the brief. PG&E argues that its interpretation was in "good faith" with "no improper motive", that it arrived at the interpretation in reliance on Commission staff, that it was caused by "unavoidable increases in delayed and estimated bills", and that no more than a "small number of customers… were harmed". (PG&E Opening Brief, pp. 2-3.)

First, PG&E provided no evidence as to how it arrived at its mistaken interpretation that the definition of "billing error" excludes the failure to send any bill at all. (PG&E Opening Brief, p.6.) Common sense tells us that the failure to send a bill is a billing error. The Commission stated: "This extremely narrow definition of billing error is *neither a reasonable nor a common-sense regulatory interpretation*." (Emphasis added. D.05-09-046, p.7.) It is difficult to see how PG&E can characterize a clear error as a "good faith" error, especially in light of the fact that the error benefited PG&E by millions of dollars. Nevertheless, PG&E claims its error was "well intentioned" and "reasonable". Despite complaints from its customers and clear direction from the Commission (in *Skinner v. PG&E*), PG&E ignored Rule 17.1 and instead quoted from Rule 9, erroneously telling its customers that Rule 9 required PG&E to collect money for all usage.

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[2] PG&E's Opening Brief does not assert that PG&E did not violate the tariff.

In fact, there is scant evidence that PG&E ever truly analyzed the problem (much less sought legal guidance from the Commission) in response to the numerous consumer complaints. PG&E's testimony offers not one shred of historical background or documentary evidence that sheds light on how PG&E arrived at its unreasonable interpretation. On cross-examination, the only testimony regarding PG&E's "good faith interpretation" of Tariff Rule 17.1(B)(2)(a) indicated that in response to one complaint, Mr. Bottorff had a couple discussions with PG&E Tariff Analyst Wilson Lau in around 2000. (RT 4980:14-24.) After those discussions, which involved "a complaint about a customer who had received a bill for several months", Mr. Bottorff and Mr. Lau came to the *wrong conclusion* and decided not to honor the three month time limit on backbilling. (RT 4981:24-28.) Other than that discussion, PG&E had no other discussions (prior to when the issued was raised by CPUC staff in 2004) regarding the application and interpretation of Rule 17.1(B)(2)(a). (RT 4981:7-11.)

Second, the Commission made it clear that PG&E's reliance on CAB's "closure letters" to customers does not make its behavior lawful or correct. (See PG&E Opening Brief, p.10.) In any event, the letters from CAB indicate that CAB staff was merely repeating PG&E's staff findings with regards to the customer's complaint, and constituted later "agreement" with PG&E. (Ex.4, Att.32.) PG&E arrived at its mistaken interpretation prior to the date of the earliest "closure letters" issued by CAB to customers. In fact, prior to the letter from Executive Director Steve Larson in 2004, Mr. Bottorff was unaware of the CAB "closure letters" and only later became aware of CAB's "endorsement" of PG&E's position. (RT 4995:1-15.) In other words, PG&E could not have reasonably "relied[3]" on a position taken by CPUC staff that was not in existence prior when PG&E formed its interpretation.[4]

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[3] PG&E fudges the definition of reliance. PG&E did not make a detrimental change of position in reliance on the CAB "closure letters". See *infra*, e.g., the *Metromedia Fiber Link* case, where Metromedia began installing fiber optic facilities only after seeking permission based on a Commission representation that it did not have to perform an environmental review.

[4] Mr. Bottorff did not become aware of the CAB "closure letters" until this litigation was initiated, and could not say

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Furthermore, PG&E mischaracterizes a conversation between Mr. Bottorff and Mr. Paul Clanon, then Energy Division Director, as if there were some kind of binding agreement between Mr. Clanon and PG&E. (PG&E Opening Brief, p.12.) Mr. Bottorff selectively recalls that Mr. Clanon agreed that the Commission's policy would be "forward-looking only". (PG&E Opening Brief, p.14.) However, Mr. Bottorff apparently disagrees with Mr. Clanon's statement made in deposition that such a statement "would be unusual for me to make" and that "I just really don't speak for the Commission." (RT 4967:8 – 4971:1.) In any event, PG&E's purpose in relaying this conversation is not clear, since it occurred in August 2004, after CAB staff had already indicated to PG&E that the Commission had concerns about PG&E's misinterpretation of the tariff. Mr. Clanon's statements, if he even made them, would not alleviate PG&E's responsibility for past refunds, since the Commission speaks through its rulings, not Mr. Clanon.

Third, PG&E's statement that the increases in "delayed and estimated bills" were caused by the conversion to a new billing system is both irrelevant and misleading. (PG&E Opening Brief, p.19.) It is irrelevant because CPSD does not seek a fine or refunds based on the increase in backbills, but for violations of the tariff. The statement is misleading because the data shows that the new billing system did not immediately cause an increase in "delayed and estimated bills" – in fact, the number initially *decreased*. (For example, immediately after CorDaptix was implemented, the number of "delayed bills" was only 1,147 for January 2003 and 1,812 for February 2003, as opposed to over 2,000 a month for the entire year 2002. Ex. 9.) Only after the moratorium was lifted did the number begin to increase. PG&E claims the increase in collection activity reflected only the process of working through the backlog of customers who previously were eligible for collections activity, but who were immunized from such activity during

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whether anyone in management had reviewed them prior to arriving at PG&E's mistaken interpretation of the tariff. (RT 4995:13-19.)

PG&E's moratorium. (Ex.34, 8-2.) Thus, it was PG&E's management's unreasonable actions that caused tariff violations, not the implementation of a new billing system.

Fourth, PG&E's statement that "few, if any" customers were harmed is simply false. (PG&E Opening Brief, p.29.) The issue of harm was discussed at length in CPSD's and TURN's Opening Brief. All customers that had to pay illegal overcharges suffered the same financial harm – they had to pay charges that they did not owe. In addition, CPSD demonstrated through customer letters that customers suffered additional harm, such as inability to pay rent, stress, financial hardship, and frustration. (Ex.5, pp.6-10.)

B. CPSD's Response to PG&E's "Three Questions"

PG&E frames the issues as "three questions" – first, should refunds be ordered? (PG&E Opening Brief, p.27.) Second, if refunds are ordered: to whom, in what amounts, for what time periods, and who should fund them? Third, are penalties warranted?

1. Question 1: Refunds Should be Ordered

PG&E's argument that "no refunds are warranted" is primarily based on the mistaken assumption that PG&E "did not harm the great majority of customers." (PG&E Opening Brief, p.29.) However, this is irrelevant to the analysis presented by CPSD's Opening Brief, and it is factually wrong. CPSD argues that refunds are warranted where PG&E charged "excessive or discriminatory amounts" which were "unlawfully collected by the utility"; thus proof of additional harm is irrelevant. (D.98-12-075. p.53.) The standard for refunds that should be applied in this case is whether the utility unlawfully collected excessive or discriminatory amounts in violation of the tariff. The statute (PU Code section 734) does not require evidence of additional harm, such as the type PG&E argues is necessary. CPSD has proven that PG&E collected large amounts of money illegally, which merits an order of refunds regardless of "additional harm", even if such a requirement existed.

Even if CPSD was required to prove additional harm (which it is not), CPSD has presented such evidence. PG&E acknowledges that the large backbills can and did cause frustration to its customers. (PG&E Opening Brief, p.29.) In this regard, CPSD has proven two things: one, that tens of thousands of customers were overcharged as a result of illegal backbills in the amount of millions of dollars (Exs. 9 and 10); and two, that a large sample of customer letters indicate that payment of these illegal charges caused severe financial hardship after agreeing to harsh payment arrangements to avoid threatened disconnection.

PG&E next argues that requiring the "general body of ratepayers" to fund the energy usage of a "small percentage of customers" would be unfair. (PG&E Opening Brief, p.31.) CPSD agrees that ratepayers should not be charged for the refunds, so this argument is moot.

Finally, PG&E agrees that "any charges to customers for delayed bills" in violation of the tariff after the 2004 Larson letter (Ex.4, Att.1) should be credited to customers. (PG&E Opening Brief, p.33.) CPSD recommends that the Commission order a full accounting of all refunds paid by PG&E for this period. The numbers of illegal backbills in 2005 (after PG&E supposedly changed its practices – see Ex.9) suggest that problems may still have existed after 2004 and should be accounted for.

2. Question 2: Refunds Should Be Ordered To Those Customers Who Were Charged Illegally, In The Amounts They Paid

PG&E's next questions are the amount of refunds to be paid, to whom, for what time period, and who should fund them. (PG&E Opening Brief, p.33.)

PG&E suggests that only low-income customers were harmed and deserve refunds (and then only 25% of the amount overcharged); specifically, those who were participants in the CARE program at the time they received a backbill. (Ibid.) However, this would violate the requirement of Public Utilities Code Section 532 that utility rates be applied uniformly to all customers. But more importantly, PG&E's suggestion ignores the fact that middle-income families suffered just as much under the harsh payment arrangements. PG&E's suggestion also ignores the burden on businesses that pay very large energy bills – for example, if a hospital is on a tight or fixed budget, a large backbill may affect its ability to stay in business or provide health care at existing levels. It would be unreasonable (and inconsistent with PU Code Section 532) for the Commission to find that lower-income customers are more worthy of reparations when all customers receiving illegal backbills were equally the victims of PG&E's unlawful billing practices.

PG&E also suggests that refunds should be limited to those customers of record, plus customers identified "through publication of a refund notice in newspapers." (PG&E Opening Brief, p.36.) The Commission should require PG&E to do more than just post a notice in a newspaper if it cannot find a current address for an ex-customer. CPSD recommends that the Commission order PG&E to first use standard locator techniques (such as putting names through the National Change of Address database). If PG&E cannot locate a current address, it should then send refund checks to the last known address, with any unclaimed restitution to escheat to the State.

PG&E also argues that it should not pay interest on the refunds, since (PG&E argues) it did not clearly err. It is difficult to understand this argument, since PG&E basically admits it violated the law. It is so clear that PG&E violated the law that PG&E's Opening Brief does not contest the issue. Since PG&E clearly, and without dispute, violated the tariff, the Commission should find that PG&E "clearly erred" and order interest to be paid on refunds. (This is discussed at length in CPSD's Opening Brief at pp. 31-33.) PG&E has no right to the time-value of the money that it was not entitled to in the first place.

PG&E argues that refunds should be limited in time. (PG&E Opening Brief, p.38.) PG&E cites the case *Almond Tree Hulling Co. v. Pacific Gas and Electric Co.*, (D.05-10-049), for the proposition that the Commission has the discretion to shorten the refund period, if the circumstances call for it. CPSD does not disagree that the Commission has such discretion. However, the circumstances in this case do not call for a shortening of the time period for refunds. The May 26, 2005, Scoping Memo described the time period at issue as 2000 to 2005, and CPSD's investigation revealed tariff violations and overcharges throughout that time period. It would make no sense to artificially limit the refund period, or to ignore the plight of identified victims without good cause. PG&E offers no good cause, although it attempts to parse the years 2000 to 2005 into pre-CorDaptix and post-CorDaptix implementation. (PG&E Opening Brief, p.41.) However, since the implementation of a billing system was not the primary (or even secondary) cause of the violations, it makes no sense to follow that logic.

PG&E claims that data limitations in the LCIS period (pre-2002) make it so difficult to obtain an accurate list of customers that no refunds should be paid. (PG&E Opening Brief, p.42.) CPSD disagrees – in fact, CPSD has already obtained a list of customers for this period from PG&E. (See Exs. 9 and 10, which list the source databases for the information obtained from PG&E, specifically PG&E Response to CPSD data request 004-MDK, Question #1 supplements.) CPSD agrees that the list may be under-inclusive, based on the fact that some names from CPSD's customer samples did not appear in PG&E's database. (See Ex.5, CPSD Rebuttal Testimony, p.16.) However, the Commission should feel confident that at a minimum, the numbers included in CPSD's exhibits are valid, and that if there is any problem with the data, it is that there might be other customer/victims that were not picked up in the database queries done by PG&E. In any case, PG&E's data problems should not be used to *reward* PG&E by forming the basis of a decision not to order refunds. At a minimum, the known affected customers should receive refunds.

CPSD went to great lengths to obtain up-to-date and accurate data from PG&E. A recounting of CPSD's attempts to obtain data is in order:

- June 1, 2005: CPSD data request for numbers and dollar amounts for delayed and estimated bills (003-MDK, Q's #1 and #2)
- Mid-June: PG&E requests time extension to respond
- July 15: PG&E responds regarding post-CorDaptix time period
- July 21: CPSD sends new data request for expanded data for delayed and estimated bills (004-MDK)
- Aug.10: PG&E responds with expanded data for post-CorDaptix time period
- Sept. 19: PG&E responds with revised post-CorDaptix data, and for LCIS time period

- Sept 23: PG&E provides Supplement #1, revising previously-provided data regarding numbers and dollar amounts for delayed and estimated bills, post-CorDaptix period
- Dec. 2: PG&E provides Supplement #2, another revision to the data
- January 11, 2006: PG&E provides Supplement #3
- March 22: PG&E provides Supplement #4
- May 1: PG&E provides Supplement #5, revising LCIS period data
- May 3: CPSD sends new data request for numbers and dollar amounts for post-April 2005 (015-KSN)
- May 10: PG&E provides Supplement #6; "clarification" of certain data
- May 22: PG&E objects; refuses to respond to CPSD data request 015-KSN; CPSD Motion to Compel denied

PG&E's attempt to limit the refund period by raising the statute of limitation issue also fails. The Commission found in *Hillview Water Co.* (D.03-09-072), that the statutes of limitations do not apply to Commission-initiated investigations. PU Code Sections 734 (refunds) and 2107/2108 (fines) contain no time limits. PG&E attempts to impose a two-year limitation based on Public Utilities Code section 735 (PG&E Opening Brief, p.39), which only applies to customer-initiated "complaints for damages", not Commission-initiated investigations.

In *Hillview*, the Commission stated:

> We recognize that, under Section 736, a claim for damages resulting from the violation of any of the provisions of Section 494 or 532 must be filed with the Commission, or any other court of competent jurisdiction, within three years. However, Section 736 and the three-year statute of limitations found therein, does not apply here. This proceeding is about a tariff violation committed by Hillview, not a claim for damages. (D.03-09-072.)

Similarly, this case involves tariff violations by PG&E, not a complaint for damages by a customer.

It would be extremely unfair to impose a time limit on refunds to customers who were not a party to this proceeding, and relied on the denial letters sent by PG&E that asserted that under Rule 9, customers had to pay of all charges accrued, regardless of any time limits. The statute of limitations is tolled until a plaintiff discovers or should have discovered the facts essential to the cause of action. (*TURN v. Pacific Bell*, D.93-05-

062.) PG&E's own actions prevented customers from discovering their cause of action. Thus, even if the Commission were to impose a statute of limitations pursuant to Section 735 or 736, the Commission should find that the statute was tolled until customers had the ability to discover the violations. Also, PG&E's misleading statements to customers regarding Tariff Rule 9 should be considered.

Next, PG&E refers to Tariff Rule 17.1(B)(1)(a), which would correctly apply if PG&E found an overcharge to a customer and issued a refund. (PG&E Opening Brief, p.41.) This case, however, involves a Commission-initiated investigation into whether PG&E violated its tariffs, not a case where PG&E agrees that it overcharged customers and willingly pays refunds[5]. Therefore, the three-year limit in Rule 17.1(B)(1)(a) is inapplicable.

PG&E believes refunds should be charged to PG&E's customers through higher rates. (PG&E Opening Brief, p.45.) CPSD strongly opposes such an idea, which is discussed in detail in CPSD's Opening Brief, pp. 40-41. TURN's Opening Brief also discussed this issue in depth, at pp. 43-52. Typically, ratepayers do not pay for the consequences of management's decisions that violate the tariffs – to do so would place the burden of compliance on ratepayers who have very little ability to oversee the day-to-day decision-making of the utility.

PG&E argues that the Uniform System of Accounts (USOA) dictates the "framework" for ratemaking treatment of revenues. (PG&E Opening Brief, pp.46-47.) CPSD agrees that the USOA applies to public utilities and contains detailed rules about accounting – however, as stated by both CPSD and PG&E, the Commission has the

[5] Many of PG&E's arguments are based on that fundamental flaw; namely, that this is a ratemaking proceeding, not an enforcement proceeding. Clearly, in an enforcement proceeding the Commission has the authority to impose monetary fines and to order refunds – see PU Code sections 532, 701, 734, 2107, 2108, etc. PG&E confuses the issue by ignoring the fact that PG&E has committed thousands of tariff violations, and instead focuses on the proper ratemaking treatment (assuming a fictional hypothetical where PG&E never illegally overcollected money in excess of the time limits in the tariff). The proper future ratemaking treatment for unbilled revenues (that occur as a result of the tariff time limits) is best left to the GRC, which is occurring simultaneously to this case. However, the Commission certainly could provide guidance in this case as to the proper accounting that PG&E should follow in the future.

discretion to order refunds and penalties, and to decide how those refunds and penalties should be accounted for. Nothing in the USOA "dictates" that PG&E's customers must pay for refunds in the event that the Commission orders refunds to be paid to victims. The argument that PG&E's "Preliminary Statements" in its tariffs *require* PG&E's customers to pay for a Commission-ordered refund is simply absurd. (See PG&E Opening Brief, p.49.) Balancing accounts are merely accounting tools, they are not laws that dictate legal responsibility for unlawful behavior; they are devices to assist in the accurate accounting of costs and revenues. Nothing in any USOA or any balancing account binds the Commission's hands, preventing the Commission from ordering that the burden of the refunds be borne by PG&E's shareholders. PG&E acknowledges that utilities "are bound to follow the USOA, *absent affirmative modification by the Commission*" (emphasis added), and "must follow the directions in the tariffs *unless and until the Commission orders otherwise*" (emphasis added). (PG&E Opening Brief, p.47.)

PG&E argues that Decision 86-06-035 requires balancing account treatment for the non-collected portion of revenues billed to customers due to the tariff time limits. (PG&E Opening Brief, pp.51-52.) This argument was thoroughly discussed and refuted by TURN's witness Mike Florio, and discussed at length in TURN's Opening Brief, pp.46-48. Nothing in the 1986 *Retroactive Billing Decision* affirmatively states what PG&E argues. The decision is clearly silent on the issue. Also, nothing in the cases cited by PG&E witness Ms. McManus affirmatively state so, either. Repeatedly on cross-examination Ms. McManus admitted that the cases cited by PG&E are *silent on the issue*. (RT 5167:1 – 5182:16.) Nor is there compelling evidence that PG&E has always accounted for these uncollected revenues in balancing accounts. There is no <u>documentary</u> evidence that PG&E ever did so. Ms. McManus <u>claims</u> (Ex.34, pp.9-6 to 9-8) that such amounts were historically recorded in balancing accounts, but apparently this was done without the Commission's knowledge or approval, since the decisions are silent on the issue. Moreover, it did not occur very often (if ever), since PG&E actually billed and collected the illegal overcharges from the vast majority of customers, thus the amounts would not have been recorded as "unbilled revenue" in balancing accounts. In any event, in this case the Commission has the discretion to order a different accounting method.

PG&E grasps at straws in order to find a justification to refuse to pay refunds. Variously, PG&E cites to a 1999 settlement in a GRC with ORA, claiming that ORA agreed that these uncollected revenues should be given balancing account treatment; PG&E argues that shareholder-funded refunds would have no deterrent effect (PG&E Opening Brief, p.65); PG&E claims that "a deviation from normal ratemaking would trigger undesirable results", apparently arguing that PG&E would be discouraged from making any customer service improvements in the future; PG&E claims the bankruptcy settlement bars shareholder refunds; and in the biggest stretch of all, PG&E appears to suggest that the very financial health of the company would be jeopardized, claiming that "shareholder funding of refunds may affect the stability of PG&E earnings", causing it to suffer "more variable earnings, higher risk, and potentially higher cost of capital." (PG&E Opening Brief, p.68.) None of these "doomsday" scenarios have any merit.

3. Question 3: Penalties are Warranted

PG&E argues that no penalties are warranted. (PG&E Opening Brief, p.69.) In D.98-12-075, the Commission discussed two major considerations when calculating monetary fines – the severity of the offense and the conduct of the utility. The Commission also stated that the financial resources of the utility, the public interest, and the role of precedent should be considered.

PG&E argues that these factors should be applied to restitution, which is simply wrong. The Commission stated: "Reparations are not fines and conceptually should not be included in setting the amount of a fine. Reparations are refunds of excessive or discriminatory amounts collected by a public utility. *Public Utilities Code § 734*. The purpose is to return funds to the victim which were unlawfully collected by the public utility." (D.98-12-075, p.53.) The Commission cases involving refunds are too many to recite here – but it is well-settled that the Commission can order a utility to return unlawfully collected money without considering the severity of the offense, the conduct of the utility, the public interest, etc. Those factors have been historically and properly applied to the calculation of a fine.

For example, in the cases cited by CPSD regarding interest, the standard for imposing interest is “clearly erred” or “derelict in its duty”. How can the standard for imposing interest on refunds be lower than the standard for ordering the refunds themselves? Clearly, the standard for refunds is simply whether the money was collected by the utility unlawfully, regardless of whether there is any “bad motive” (see CPSD Opening Brief, p.17 – mental state not relevant) or “financial hardship” (see CPSD Opening Brief, p.16 – proof of additional harm not required). There are no cases where the Commission set the level of *refunds* based on the “severity of the offense” or the “conduct of the utility”.

In support of its argument that no penalties are warranted, PG&E has managed to identify one case in which the Commission found that a technical violation had occurred, but due to mitigating factors decided not to impose a fine. CPSD believes this case is substantially different.

In *Metromedia Fiber Network Services, Inc.* (D.04-04-068; A.00-02-039), the Commission considered whether Metromedia’s “use of the registration process and MFNS's construction activity did violate Commission Rule 17.1 *et seq*.”[6] (D.04-04-068, p.1.) Metromedia used the Commission’s registration process to obtain a CPCN for authority to install fiber optic facilities. The Commission found that a technical violation had occurred because Metromedia should have sought a CEQA review prior to commencing construction, but declined to impose penalties. The case is distinguishable in many respects. First, it was an application case, not an enforcement proceeding. Second, Metromedia disclosed the scope of the proposed project to the Commission, as opposed to the Commission initiating its own investigation. Third, Metromedia

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[6] It is not clear whether PG&E believes this case to be a precedent regarding PG&E Tariff Rule 17.1; the Commission’s Rules of Practice and Procedure are not the same as PG&E tariffs, although the number of the rule is the same. In *Metromedia*, the Commission was analyzing Commission Rule 17.1, involving environmental impact reports, not time limits on backbilling contained in Tariff Rule 17.1.

specifically sought out staff's advice before taking a position in detrimental reliance upon that advice, as opposed to taking a position first, and then finding out later that some CPUC staff had taken a consistent position in "closure letters" to customers that were discovered as a result of this enforcement proceeding. Fourth, although Metromedia failed to obtain a CEQA review prior to commencing construction, no harm was done to the environment because Metromedia immediately stopped construction when contacted by the Commission and ultimately obtained a Negative Declaration, as opposed to here where Commission staff has determined that PG&E has financially harmed thousands of customers. Finally, several decisions had already been issued by the Commission approving fiber optic installation without requiring an environmental review, as opposed to here where the only case on point is *Skinner v. PG&E*, which found against PG&E on the backbilling issue.

In *Metromedia*, the Commission itself (in D.98-07-108) as opposed to staff found that Metromedia "was qualified to use the registration process," after specifically being notified by Metromedia that it "will construct fiber optic transmission facilities throughout the State of California in order to provide dedicated and private line access services." That is simply not the case here – PG&E did not obtain prior Commission approval. Nor did PG&E seek out CAB staff's opinion[7], or take a position in reliance on the CAB staff "closure letters". In fact, PG&E had set its policy regarding backbilling long before the existence of the CAB letters, which were directed to PG&E customers, not PG&E. In fact, prior to each individual CAB letter, PG&E *had already denied the customers' attempts to resolve the high backbills*. (See Ex.34, Exhibits A-K thereto.) CAB's representatives were reviewing the correspondence from the customer and from PG&E, in which PG&E had already made a determination to deny the customer's complaint and impose the full amount of the charges. (*Ibid*.) This is a far cry from

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[7] PG&E should not have sought legal advice from CAB because "PG&E knows very well that the informal opinions of the Staff cannot bind the Commission." (D.05-09-046.)

Metromedia, where Metromedia did not start construction before obtaining Commission approval.

With regards to the severity of the offense, PG&E argues that the offense was not severe because "the great majority of customers sustained no economic harm." (PG&E Opening Brief, p.72.) The issue of harm has already been exhaustively dealt with previously in CPSD's and TURN's Opening Briefs. But it is worth noting that PG&E makes the startling assertion that "PG&E did not believe it would benefit from its conduct." (Ibid.) How could PG&E have not known that there is a financial gain from billing a customer, as opposed to not billing the customer? It is not reasonable to suggest that PG&E was unaware of any financial gain, especially when it lifted the moratorium on collection efforts. Clearly, PG&E was aware of the financial ramifications of its actions, especially when it lifted the moratorium in early 2003 and began "working through the backlog of customers who previously were eligible for collections activity, but who were immunized from such activity during PG&E's moratorium." (Ex.34, 8-2.) This indicates an awareness of the financial impacts on customers, which necessitated the moratorium in the first place.

PG&E points out that "lower fines have been imposed on utilities with comparable financial resources." (PG&E Opening Brief, p.75.) That is a misleading statement, because the Commission has also imposed much higher fines than the one sought by CPSD in this case. For example, in the *Qwest* case, (D.02-10-059), the Commission imposed a fine of approximately $20 million; in a settlement with SBC regarding its provisioning of DSL in California, SBC agreed to pay $27 million to State's General Fund pursuant to PU Code sections 2107 and 2108.

Also misleading is the reference to the SCE General Order 95 Investigation, D.04-04-065, where SCE was fined $656,000; that was for 30 violations for $20,000 *each*, which in one sense is a much larger fine (per violation) than the one sought by CPSD in this case. More comparable is the Settlement Agreement between PG&E and CPSD in the PG&E Mission Substation Fire and Electric Outage investigation, I.05-03-011. PG&E's shareholders agreed to pay $6.5 million in settlement of the case for an unsafe condition that existed at its Mission Substation since 1996. Another case cited by PG&E is the SoCalGas electric choice program case, D.01-06-080, where the Commission imposed a fine of $300,000 for a violation that continued for 475 days (about $630 per day). The amount imposed (per day) is not substantially different than the amount recommended by CPSD in this case. It should be noted that the Commission specifically found that "SoCalGas showed no contrition for its actions and has not acknowledged wrongdoing," (D.01-06-080, FoF 22), which is similar to this case. The reason the fine was not larger was because the violation was of a more technical nature (operating the electricity platform of the Energy Marketplace website without advice letter approval) with no evidence of direct financial harm to customers (finding that SoCalGas profited from "undue gains from the electricity platform in the form of goodwill"). (D.01-06-080, FoF 17.)

III. OTHER ISSUES

PG&E discusses a few remaining issues. First, that PG&E does not object to the payment of $100 to those customers who were charged reconnection fees whose service was terminated 75 to 150 days after having received a backbill. (PG&E Opening Brief, p.81.) However, PG&E opposes a full refund of the total reconnection fees. CPSD sees no reason to arbitrarily limit the refunds to $100, if the customers in fact paid more than $100. Also, PG&E's proposal that CPSD and TURN prove that each customer was not already eligible for shut-off for some other reason is not workable. CPSD and TURN are not in a position to know if there is some other reason, since PG&E has the records. CPSD's data requests and PG&E's responses were based on the fact that a service termination close in time to the failure to pay a large backbill is by definition related to that illegal backbill. It is a fair balance to require PG&E to refund the full reconnection fees where termination occurred within 150 days of the customer receiving an illegal backbill.

Second, PG&E argues that deposits following illegal backbills are "moot" since PG&E "periodically re-evaluates the need to hold any credit deposit it may have from a customer." (PG&E Opening Brief, p.84.) Nevertheless, CPSD was informed by PG&E

that PG&E still holds customer deposits required after presentation of an illegal backbill. CPSD recommends that PG&E either return the following deposits or provide evidence that the accounts identified have been reviewed and the deposit returned: $285,893 (non-res, $2,896), plus interest (Table VI-4, Ex.3); $3,882.33 (Table X-4, Ex.3).

Third, PG&E argues that the effect of illegal backbilling on credit scores is moot. (PG&E Opening Brief, p.85.) CPSD recommends that PG&E provide documentation that shows that the credit scores have been rectified for each of the customers that suffered shut-off for non-payment of an illegal backbill.

Fourth, PG&E argues against any modifications to Tariff Rule 9 in order to simplify and streamline the estimation methodologies. (PG&E Opening Brief, p.85.) However, CPSD's analysis is based on many factors, including: D.01-05-064, PG&E's Tariff, PG&E's responses to numerous data requests, customer bills submitted by PG&E, and over 230 CAB complaints. (Ex. 3, p.67.) CPSD concedes that PG&E's estimates are generally accurate, so long as the estimates are based on the ADU from the customer's prior year, same month usage. (Ex.5, p.20). CPSD agrees with PG&E that a change to Rule 9 would mean that even if a customer's prior year's ADU was based on a trend table because PG&E had no historic usage information for that customer, PG&E should still use that ADU in estimating the customer's current month's usage. However, CPSD disagrees with PG&E that its current method of using the last available read when no historical usage is available produces a more accurate estimate (Ex. 34, p. 3-7). For example, Attachment 44 illustrates why illogical consequences would flow from PG&E's method of using the last available read, since this method causes unnecessary calculations, is complex and potentially confusing to consumers, and creates inflated charges assessed to consumers. In fact, in a data response by PG&E, (when illustrating the use of a trend factor, which is a part of PG&E's preferred method of calculating this example) identified as Attachment 41, PG&E concedes that "if a customer's usage was not in line with that of other customers in his or her area, then the estimation method for residential accounts might not be accurate."

A. Methodological Disputes: Appendix 1

The Appendix to PG&E's Opening Brief contains three additional questions: first, should PG&E refund all estimated bills over three months, or only the backcharges; second, does the three month time-limit include the current month's bill; third, is the data reliable?

The calculation of the estimated bills refunds is discussed thoroughly in CPSD's Opening Brief, pp. 27-30, and is not repeated here. CPSD stands by its testimony that utilities should not be allowed to send estimated bills indefinitely.

The question regarding the calculation of the three month time-limit is discussed in CPSD's Opening Brief, pp. 22-24. CPSD's definition would allow PG&E to send backbills that are *no more than* three months old. PG&E's definition would allow it to send backbills for three months total, *no matter how old the charges*. Clearly, CPSD's definition matches the exact language and intent of the tariff.

Lastly, CPSD has already discussed above the attempts to obtain up-to-date and accurate information, which is not repeated here. CPSD believes the data is sufficiently reliable to order refunds, although PG&E may have been under-inclusive in its database queries as demonstrated by customer samples that were not in PG&E's database.

Respectfully submitted,

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July 28, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **REPLY BRIEF OF THE CONSUMER PROTECTION AND SAFETY DIVISION TO PG&E'S OPENING BRIEF IN THE BILLING AND COLLECTION INVESTIGATION** in **A.02-11-017 et al.** by using the following service:

[X] **E-Mail Service:** sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

[ ] **U.S. Mail Service:** mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on July 28, 2006 at San Francisco, California.

/s/ ALBERT HILL
Albert Hill

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address and/or e-mail address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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